Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE HABIT OF DISSENT.*

The Supreme Court of the United States holds but one term within each period of twelve months, which begins in October. During the term a great number and variety of cases are disposed of. Ordinarily more than two hundred cases, most of them highly litigated, are decided, in which there are written opinions. In addition, many cases are decided without written opinions, or with opinions that consist in every instance of a short memorandum, and also in addition hundreds of petitions for writs of certiorari, that is to say applications to the Court to use its discretion in placing on its docket cases that have been decided by the lower courts, are denied with merely an announcement in each instance of the fact of denial, and these petitions often involve most novel and intricate questions.

In the last two classes of proceedings, there is rarely any evidence of a division of sentiment among the justices. It cannot be supposed that there is always agreement, but when there is disagreement it is not stated.

The first class of cases, the more than two hundred, include cases in which the Court passes on the validity of statutes, the construction of statutes, large governmental questions, and other matters of more or less importance. A considerable proportion of those cases not only engage the strenuous efforts or litigants and lawyers, but the eager attention of the country. The theory, of course, is that when a particular case is decided, the law applicable to it is finally determined, and becomes the rule which all must observe. Everybody will probably admit that, in order to insure confidence in the work of the Court, the correctness of its conclusions should not be unnecessarily impugned. This does not mean the disallowance of the right to criticize. It should mean, however, the absence of any criticism that is fairly avoid-

*Note.—The editorial in a late issue of the VIRGINIA LAW REGISTER on "The Amenities of Dissent" leads me to raise the question, which I do with considerable diffidence, as to whether an expression of dissent is commonly or ever expedient. While what I have written applies directly to the Supreme Court of the United States, it may not seem inapplicable to other Courts of last resort. Though hastily compiled, I believe the dissent statistics are at least approximately correct as I have given them.

able. But what is the fact? In a large percentage of the cases, members of the Court themselves become critics of the majority. Sometimes it is simply announced that a justice, or several justices, dissent from the conclusions that have been reached; sometimes the objectors write dissenting opinions often more elaborate than the majority opinions, attacking, and frequently in a rather severe manner, the judgments or decrees that are rendered; sometimes the dissent does not strike at the decisions, but at the reasoning employed in their support. Thus, there are several kinds of dissent that contest the correctness of what is done by the Court, and create doubt as to whether the majority is capable or incapable, wise or unwise, and whether right or wrong has resulted. Nevertheless, the tribunal is "one Supreme Court", in the language of the Constitution, and is assumed to be capable, wise, and just.

The habit of dissent has grown and is growing. In the last year that Chief Justice Marshall presided, there were opinions delivered in thirty-nine cases, with only three dissenting opinions, or less than four per cent. At the October term, 1903, there were thirty-eight dissents in two hundred and one cases, or over fifteen per cent. At the October term, 1919, there were sixty-five dissents in one hundred and eighty-nine cases, or over thirty-five per cent. The 1903 term is mentioned because of what Mr. Justice Holmes said in the Northern Securities case, decided at that term. "I am", said the justice, "unable to agree with the judgment of the majority of the court, and, although I think it useless and undesirable as a rule to express dissent, I feel bound to do so in this case and give my reasons for it".

The writer, who admires Justice Holmes for his many remarkable qualities, regrets that he did not then and there protest against the dissent habit as not only useless, but undesirable.

If the practice were simply useless, it would invite little discussion beyond that it takes up time that could be more profitably employed, and that any expedient tending to save the time of the Court should be welcomed when there is so much delay in disposing of cases. But if it is an undesirable practice, something more is to be said, inasmuch as the public interest is presumably prejudiced by any judicial practice that is undesirable.

All of the cases in the class referred to are carefully and ma-

turely considered. Each is the subject of conference, and then a roll-call vote is taken. The majority opinion, which is the Court's opinion, is then prepared by the justice to whom the Chief Justice assigns that duty. The opinion, when drafted, is printed and circulated for comment and put in final form after the comments are passed upon. Thus, there is the utmost effort to be accurate and arrive at correct conclusions. As an eminent member of the Court, now dead, once stated in an address, "When you find an opinion of the Court on file and published, the profession has a right to take it as expressing the deliberate views of the Court, based upon a careful examination of the record by each justice participating in the judgment." But following all the debates and voting, and the laborious settlement of the terms of the majority opinion, in a great many cases individual justices indulge in the habit of submitting to the world views which a majority of their brethren in conference have already rejected, and in effect they advise the public that in their estimation the facts have been misunderstood or the law misapprehended or misapplied, with resulting wrong to the litigants and perhaps the general public. Can this be regarded as other than a sort of undesirable self-exploitation? Is any good purpose served by a single justice or group of justices making a declaration at variance with the decision which represents the studiously worked-out conclusions of the majority proclaiming to the world what the law is? Who benefits by a knowledge of the attitude of the disagreeing member or members of the Court? The knowledge may afford some little consolation to the litigants and lawyers on the losing side, but, of course, that consideration cannot control. Congress is not assisted by the knowledge that there is disagreement, because if the case is of public importance it is sufficiently discussed in the public journals, as well as in the briefs of counsel, for Congress to be fully informed of the situation to which it pertains, and of any necessity for legislation. Should it be argued that dissent is of value to emphasize the expediency of legislation by Congress, the reply is not only that its sources of information are ample, but that a matter of policy which is often a matter of party politics, is not within the province of the Court or members of the Court. Should it be said that a justice would stultify or discredit himself by seeming to acquiesce in a decision he disap-

proves, the ground for such an argument would disappear if everybody knew that, in the interest of good government, the practice of dissent has been abandoned.

The outstanding objection to the habit of dissent is that it weakens and injures the Court with the public. It makes the impression that the Court is not as able as it should be; not as learned, not as wise, not as harmonious, and, therefore, not entitled to the full confidence which it should have, and that dissenting justices are too little inclined to subordinate themselves in an effort to maintain the theoretical unity of the Court, and the reverence and respect that ought to be felt towards the Court.

It may be difficult for a strong man who, as a learned and experienced lawyer was accustomed to the strife of the bar, to forego strife with his brethren when he becomes a member of the Court, but it would seem that the strife should end in the conference room and not be further protracted, and it is submitted that the Court would render a real service, by strengthening itself with the public, should it determine that none of its members will assume the attitude of open antagonists and critics of the official conclusions ultimately reached and promulgated in a particular case.

R. WALTON MOORE.

Washington, D. C.